Supreme Court, U.S.
FILED
APR 12 1995
OFFICE OF THE CLERK

No. 94-631

In The

Supreme Court of the United States

October Term, 1994

ZELL MILLER, Governor of the State of Georgia, et al.,

Appellants,

versus

DAVIDA JOHNSON, et al.,

Appellees,

and

UNITED STATES OF AMERICA and LUCIOUS ABRAMS, JR., et al.,

Intervenors.

On Appeal From The United States District Court For The Southern District Of Georgia

REPLY BRIEF OF APPELLANTS MILLER, ET AL.

MICHAEL J. BOWERS
Attorney General of the State of Georgia

DENNIS R. DUNN
Senior Assistant Attorney General

WALBERT AND MATHIS
DAVID F. WALBERT
Special Assistant Attorney General
Counsel of Record
100 Peachtree Street
Atlanta, Georgia 30303
404/523-5000

Attorneys for Appellants

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THE KIND OF PURPOSEFUL DISCRIMINATION TEST ADVOCATED BY APPELLEES PROVIDES NO MANAGEABLE STANDARDS BY WHICH THE CONSTITUTIONALITY OF DISTRICTING PLANS MIGHT BE JUDGED 1

A. Only the Appellants Have Offered Objective Standards by Which Trial Courts Could Predictably Apply the *Shaw* Principles 1

B. Appellees Fail to Articulate Any Objective Criteria to Guide the District Courts Under Their Motivation-Based Interpretation of *Shaw* 3

C. A Motivation-Based Standard Without Objective Criteria is Particularly Inappropriate in Redistricting Cases 4

II. APPELLEES IGNORE THE GREAT BULK OF THE EVIDENCE IN THIS CASE, AS DID THE MAJORITY OPINION OF THE DISTRICT COURT 7

A. The District Court's Opinion Cannot be Saved by the Clearly Erroneous Rule Since it Never Touches on Much of the Most Important Evidence in the Case ... 7

B. What Evidence the Appellees do Focus on Has Relatively Little to do With the Issues Before this Court 8

TABLE OF CONTENTS – Continued

Page

III. GEORGIA HAS ADVANCED SUFFICIENT JUSTIFICATIONS FOR A REDISTRICTING PLAN INTENDED TO PROVIDE REASONABLE OPPORTUNITIES FOR MINORITY CANDIDATES 10

A. Appellees Wrongly State That Georgia Does Not Assert Sufficiently Compelling Interests to Justify its Plan 10

B. The Various Appellants' Views of the Significance of the Voting Rights Act in This Case Differ 12

C. The Absence of a Section 2 Violation Would Not Mean That a State's Race-Conscious Redistricting Plan is Unconstitutional 13

IV. PLAINTIFFS FAILED TO ESTABLISH THE TRADITIONAL REQUISITES OF STANDING AT THE TRIAL OF THIS CASE 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Wright, 468 U.S. 737 (1984) 16

Amadeo v. Zant, 486 U.S. 214 (1988) 7

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 4

Baker v. Carr, 369 U.S. 186 (1962) 5

Batson v. Kentucky, 476 U.S. 79 (1986) 17

Fullilove v. Klutznick, 448 U.S. 448 (1980) 4

Growe v. Emison, 122 L.Ed.2d 388 (1993) 13

Hernandez v. New York, 500 U.S. 352 (1991) 17

Kelley v. Everglades Drainage District, 319 U.S. 415 (1943) 8

Loving v. Virginia, 388 U.S. 1 (1967) 17

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 16

Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990) 4

Mobile v. Bolden, 446 U.S. 55 (1980) 4

Northeastern Florida General Contractors v. City of Jacksonville, 124 L.Ed.2d 586 (1993) 16

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 4

Reynolds v. Sims, 377 U.S. 533 (1964) 1

Rogers v. Lodge, 458 U.S. 613 (1982) 4

Schneiderman v. United States, 320 U.S. 118 (1943) 8

Shaw v. Reno, 125 L.Ed.2d 511 (1993) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Tennessee Valley Authority v. Ashwander, 297 U.S. 288 (1982) 16

Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982) 16

Washington v. Davis, 426 U.S. 229 (1976) 4

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. Amend. XIV, Equal Protection Clause . . . *passim*

Voting rights Act of 1965:

Section 2 ..... 14, 15

Section 5 12

ARGUMENT

I. THE KIND OF PURPOSEFUL DISCRIMINATION TEST ADVOCATED BY APPELLEES PROVIDES NO MANAGEABLE STANDARDS WHATSOEVER BY WHICH THE CONSTITUTIONALITY OF DISTRICTING PLANS MIGHT BE JUDGED.

A. Only the Appellants Have Offered Objective Standards by Which Trial Courts Could Predictably Apply the *Shaw* Principles.

The Georgia appellants have stressed the importance of having objective criteria in applying *Shaw*. Absent such standards, there would be grave questions of justiciability and predictability. Precisely because the reapportionment process is such a uniquely "complex and many-faceted . . . political thicket," *Reynolds v. Sims*, 377 U.S. 533, 566 (1964), the need for objective, predictable criteria is especially great in this case. That is the only way to reconcile *Shaw* with the most fundamental separation of powers and federalism principle – the separation between the pure politics and political judgments that dominate legislative reapportionment on the one hand, and the judicial function that is supposed to be separate from and above politics on the other hand.

As appellants demonstrate in their principal brief, the eleventh congressional district satisfies simple, objective redistricting criteria because the district line so closely follows traditional political boundaries and physical features. By comparison, the kind of "purposeful discrimination" standards discussed by the district court and appellees are wholly unworkable and unmanageable.

Indeed, neither the trial court, the appellees, nor any amicus that has filed a brief in support of appellees, has articulated a "motivation" standard under *Shaw* that might be workable and *predictable*. Inevitably, a "motivation-based" analysis would lead to arbitrary decisions largely determined by the predilections of individual trial judges, judges who would be thrust into the role of super-legislators making judgments as to whether miles of districting lines could have been drawn "better," with more respect for "local considerations," and the like.

The inherent vagueness of the district court's motivation approach is apparent on the face of the opinion itself. The court was unable to articulate its own test clearly and consistently. At one point, the majority states that a redistricting would be unconstitutional where "race was the substantial or motivating consideration." (J.S. App. 36) The court then suggests that a plan will be subjected to strict scrutiny where race was "the overriding predominant force determining the lines of the district." *Id.*[1] Elsewhere, in attempting to apply its test, the majority suggests that a redistricting that results from *any* racial considerations is constitutionally suspect. (J.S. App. 48) Yet another kind of "standard" is suggested when the

---

[1] One of the many uncertainties under the district court's analysis is whetherthis kind of motivation analysis applies only to the overall plan, or whether it would apply equally to each individual segment of an entire district line.

court states that the legislature could constitutionally "alter the occasional line" based on race.[2] (J.S. App. 39)

B. Appellees Have Failed to Articulate Any Objective Criteria to Guide the District Courts Under Their Motivation-Based Interpretation of *Shaw*

The appellees' inability to articulate any manageable standard of proof is dramatically apparent in their brief. That brief contains a section entitled, "Objective Criteria to Govern Application of *Shaw* Already Exist." *Brief of Appellees*, pp. 32 ff. *In that section of the brief, however, appellees do not point to a single objective principle or guidepost that might provide any justiciable standard for applying a motivation-based test.* Instead, this entire section of their brief is nothing more than polemic directed against the Department of Justice, the ACLU, and "Georgia's plight."

If this Court would simply affirm the trial court, appellees contend, then Georgia would have "breathing room" to somehow divine how to reapportion constitutionally. *Brief of Appellees* at 33. What might objectively guide such "constitutional" reapportionment, however, is left a mystery. Appellees' inability to articulate objective, justiciable standards results from one simple thing: The kind of motivation-based test of constitutionality they advocate can never have objective, predictable standards.

In truth, the objective standards advocated by Georgia here – which Judge Edmondson concluded in his

---

[2] The district court does not indicate "how much" constitutes the "occasional" line – whether that would be one county out of twenty-two, fifteen percent of the entire district, or otherwise.

dissent were a necessary part of *Shaw* – provide the only guideposts that would keep the courts from simply substituting their political judgments for those of the legislatures.

C. A Motivation-Based Standard Without Objective Criteria is Particularly Inappropriate in Redistricting Cases.

This Court has adopted a subjective "purposeful discrimination" standard in a number of equal protection cases before *Shaw*. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Mobile v. Bolden*, 446 U.S. 55 (1980); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Washington v. Davis*, 426 U.S. 229 (1976). But in each of those previous cases, the purposeful discrimination test could be applied in a much more direct, meaningful way. Indeed, in all of the "benign discrimination" cases, race was an *explicit* factor, and the issue of *purpose* was immediately resolved on the face of the statute. The only real question was whether the race-based distinctions were justified. In other cases – where the challenged statute, ordinance or administrative practice included no specific reference to race – the purpose issue was still relatively straightforward. What may have constituted the purpose behind each statute or practice could be answered by a concise inquiry. For example, in *Washington v. Davis*, the question was simple: Why did the local government adopt the employment test at issue? Was it for the *purpose* of discriminating, or was it for the *purpose* of hiring an effective work force? Similarly, in the *Lodge* and *Bolden* voting cases, the question was simply *why* at-large elections were maintained. And in *Arlington*

Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), the question was again why the particular ordinance at issue was adopted.

A "purpose" analysis in a redistricting case cannot be formulated this way. As a matter of fact, the reason *why* a redistricting statute is adopted has nothing whatsoever to do with *Shaw* issues. The sole, ultimate *purpose* for enacting a congressional redistricting statute is simply to provide a mechanism of electing congressional representatives to ensure that a state has representation in Congress. This is unlike a typical "purpose" case where the entire action at issue is challenged as being borne out of a motivation to discriminate. With a reapportionment statute, one must turn away from "why the statute was enacted" and ask more detailed questions – such as why each line is where it is. Those questions inevitably reflect a complex mix of motivations. For example, left to their own devices and without the constraints of one person/one vote requirements, it is certain that reapportionment lines would be far different than they are. For one thing, they would be a good deal more regular – as they used to be in Georgia before *Baker v. Carr*, 369 U.S. 186 (1962) – because the significant constraints on district size and population would be removed. One person/one vote requirements are invariably a major driving force in why district lines are located where they are. But there are many other factors that contribute to the particulars of how the lines are drawn. Each contour in each line is a product, among other things, of the attitudes, motivations and desires of scores of people, including in the State of Georgia 236 individual legislators. It is undisputed that this mosaic of motives in the reapportionment process is

the height of political complexity. It is like no other legislative judgment. And a court's determination of "why" a districting line is located where it is would bear little resemblance to the kind of concise inquiry performed in other cases where purposeful discrimination is the telling issue.

One can make the general statement that Georgia's eleventh congressional district was designed with the overall objective of creating a majority-minority district. No one has ever contended otherwise. But to go far beyond that to determine accurately and honestly "why" specific portions of this 1,184 mile long line are located exactly where they are, would be an impossible task.[3] It may even be a meaningless task since no segment of a district line has meaning independent of the district boundary as a whole.

Appellants respectfully submit that the objective standards they advance provide the only way that *Shaw* can be applied rationally and predictably.

---

[3] Even if it were possible to ascertain the motivation of the "legislature" as to each segment of a district line, that kind of scrutiny of the mixed motivations of hundreds of legislators would be an extremely dubious judicial function. As Judge Edmondson wrote in his dissent, it is likely impossible to determine the "true" intent as to all of these matters, and it is certainly inappropriate to have "federal judges probing and intruding on state officers' thoughts (perhaps expressly crediting some state officers and not crediting others – a divisive event) to 'learn' the state's true intent." (J.S. App. 96, n. 2)

II. APPELLEES IGNORE THE GREAT BULK OF THE EVIDENCE IN THIS CASE, AS DID THE MAJORITY OPINION OF THE DISTRICT COURT.

A. The District Court's Opinion Cannot be Saved by the Clearly Erroneous Rule Since it Never Touches on Much of the Most Important Evidence in the Case.

Appellants demonstrate in their principal brief that there was abundant objective evidence that established a non-racial basis for the specific location and configuration of the eleventh district line. This evidence was ignored by the majority below, apparently because they believed that the overall racial objective of the eleventh district rendered it unconstitutional regardless of these facts. *See Brief of Appellants Miller, et al.*, pp. 3-22, 27-29. In a strained effort to save the district court's order, the appellees now contend that the order should be upheld because the ultimate conclusion is not "clearly erroneous." *Brief of Appellees*, pp. 29-32. Appellees' contention is seriously misplaced. Rule 52 is never satisfied where a court fails to make findings on the relevant evidence. Simply stating an ultimate conclusion does not remotely satisfy a court's fact-finding burden.[4] *See, e.g., Amadeo v.*

---

[4] As one of the amici supporting affirmance acknowledge, the district court never even made a finding on whether the district configuration here was "bizarre." *Brief of Anti-Defamation League in Support of Appellees*, p. 15, n. 4. This amicus also candidly acknowledges that at least the first and second Georgia reapportionment plans may well have conformed "to all traditional districting standards and requirements." *Id.* at 8. Given the great similarities between those two plans and the final plan, it is asking far too much to contend that the last plan

Zant, 486 U.S. 214 (1988); *Schneiderman v. United States*, 320 U.S. 118, 129-31 (1943); *Kelley v. Everglades Drainage District*, 319 U.S. 415, 422 (1943).

B. What Evidence the Appellees do Focus on Has Relatively Little to do With the Issues Before this Court.

Appellees brief is largely a diatribe directed against the Department of Justice and the ACLU. The reason why appellees strive so mightily to avoid the actual evidence in this case is apparent: That evidence does not support their claim.

Plaintiffs focus their criticisms on a conceptual plan that was advocated by some legislators, the "black max" plan. While it is true that that general conceptual map played a role in reapportionment, appellees' fixation with the plan is seriously misplaced. Simply put, the "black max" conceptual plan was *not* enacted, and it is *not* the plan that is before this Court now.

In their opening brief, appellants pointed out that the district court erred in focusing its attention almost exclusively on the black max plan, rather than the actual

---

should be condemned as unconstitutional without injecting a serious element of arbitrariness into the judicial decision-making process. The line between what's permitted and what's prohibited should not be so imprecise.

eleventh district. *See Brief of Appellants* at 27-29. Appellees now make the same mistake.

That the actual eleventh district and the black max concept are very, very different is apparent simply by looking at the two. The actual eleventh district is set forth in appellants' jurisdictional statement at App. 106; the black max concept is set forth at Jt. App. 60. Unlike the actual eleventh district, which consists almost entirely of intact counties and lines drawn along traditional political subdivisions, the "black max" plan ignores traditional subdivisions.

Aside from a portion of the Georgia state boundary itself where the black max concept plan and the actual eleventh district happen to coincide, the eleventh district lines in the two plans coincide only in the rarest instances. *Indeed, the very parts of the eleventh district that appellees and the district court most criticize are completely different under the black max plan.* For example, the district court and the plaintiffs are vehement in their criticism of the Effingham County portion of the eleventh district, which is a relatively narrow area that connects Chatham County to the rest of the district. As appellants have pointed out, however, the narrowness of Effingham County has nothing to do with race; it is the product of the local political desires of the *white* representative in that area. *Brief of Appellants Miller, et al.* at 15. *More importantly, in the black max plan, almost all of Effingham is included in the eleventh district.* Similarly, the plaintiffs and the district court criticize the fact that the eleventh district contains a narrow portion of Henry County. Once again, appellants demonstrated that that has nothing to do with race-based lines, Henry County being almost

entirely white. *Brief of Appellants Miller, et al.* at 12-13. Moreover, the black max eleventh district did not even touch Henry County. Instead, it traveled through an area to the north, an area excluded from the eleventh district for purely political reasons. *Id.* at 13. Also, in Richmond County (Augusta, Georgia) the entire configuration of the real eleventh district is obviously very different than it is in the black max plan. For example, a significant portion of the western part of Richmond County is included in the black max plan, none of which is in the actual eleventh district.

That the black max plan differs so greatly from the actual eleventh district was discussed by Judge Edmondson in his dissent. (J.S. App. 99, n. 5) Appellees have simply focused on the wrong plan. The only plan that is ultimately relevant is the one that the State actually enacted. Whether the black max plan would or would not satisfy *Shaw* is of no relevance. And to the extent that the black max plan is some evidence of the overall racial objective in the ultimate eleventh district, the overall purpose of creating a majority-minority district has never been disputed.

III. GEORGIA HAS ADVANCED SUFFICIENT JUSTIFICATIONS FOR A REDISTRICTING PLAN INTENDED TO PROVIDE REASONABLE OPPORTUNITIES FOR MINORITY CANDIDATES.

A. Appellees Wrongly State That Georgia Does Not Assert Sufficiently Compelling Interests to Justify its Plan.

Appellees incorrectly assert that Georgia denies that its plan is constitutionally justified if strict scrutiny is

appropriate. The justifications the State has offered are discussed throughout appellants' initial brief. Specifically, Georgia contends that the affirmative objective of drawing "a majority-minority district for the purpose of affording minority candidates reasonable opportunities to be elected" justified the lines in this case. *See Brief of Appellants Miller, et al.*, pp. 27 ff. That objective was sufficient at the very least because it was reasonable for the legislature to conclude that a majority-minority eleventh district similar to the one enacted was appropriate and *necessary* in order to "give minorities a fair shot at representation" in light of the stark pattern of white candidates winning nearly every legislative election from white majority districts in recent years in Georgia. *Brief of Appellants Miller, et al.* at 37. These facts and issues are discussed in appellants' principal brief at pp. 19-20, 29-37. Similarly, appellants have demonstrated convincingly that the district was drawn as regularly as possible, so as to satisfy that prong of the "narrow tailoring" inquiry under strict scrutiny. *Id.* at 3-20.[5]

---

[5] Appellees also make the astounding contention that the objective of creating congressional districts where minority candidates had real opportunities at election was not the "true" purpose of the State. *Brief of Appellees*, at 37-38 & n.37. That contention is clearly incorrect. Indeed, if that was not the purpose behind the drawing of the district at issue, one would have to wonder whether plaintiffs' entire "purpose theory" is misplaced.

B. The Various Appellants' Views of the Significance of the Voting Rights Act in This Case do Differ.

To say that the Georgia appellants contend that there was a sufficient justification for the current districting plan if strict scrutiny were required, is not to say that they agree with everything that the United States and the Abrams intervenors have argued in this regard. Specifically, the fundamental position of the State of Georgia is that its legislative prerogatives, under both the Georgia and United States Constitutions, authorized the General Assembly to enact the eleventh district that is at issue. We do not contend that that authority derives from the Voting Rights Act.

Appellees and intervenors take diametrically opposite views on this issue. It appears that the intervenors contend that whatever the State enacted is constitutional because it was approved under Section 5 and, at least in part, adopted in response to earlier Section 5 objections. The State would not go so far, instead predicating its authority for enacting the plan on the prerogatives of the State itself.

The plaintiffs take the exact opposite view as do the intervenors. According to plaintiffs, the plan here is fatally tainted precisely because of the administrative role of the Department of Justice under Section 5. That view is much too extreme in the judgment of these appellants. The question here is not whether the DOJ acted right or wrong or whether the ACLU has "too much influence." The question is whether the plan actually adopted by the

State of Georgia satisfies *Shaw*, and the prior administrative rulings of the DOJ are of relatively little significance in making that determination. That is because the plan before the Court was adopted by the General Assembly of the State of Georgia, and as such, it is a legislative plan entitled to all of the deference normally accorded to such plans. *See, e.g., Growe v. Emison*, 122 L.Ed.2d 388 (1993). The fact that the General Assembly was influenced, *in part*, by DOJ objections is irrelevant to assessing this plan as a state legislative plan. Indeed, had Georgia been so displeased with the actions of the Department of Justice, the State had the option of seeking judicial preclearance of any plan. By a specific vote of the General Assembly, Georgia chose not to do that. Instead, it exercised its legislative judgment to adopt the present plan. That plan is the product of hundreds and hundreds of individual motivations, "agendas," district preferences, political "trades," and the like, and it is entitled to the usual deference accorded reapportionment plans. Georgia's statute rises or falls on what it is, not on what the Justice Department thinks.

C. The Absence of a Section 2 Violation Would Not Mean That a State's Race-Conscious Redistricting Plan is Unconstitutional.

The notion of "compactness" has arisen in a variety of voting cases, and appellees loosely use the term as equivalents in very different contexts. Georgia believes that that is incorrect and that there is a significant difference between the notion of "compactness" as a threshold

issue under Section 2, as explained in *Gingles*, and "compactness" as it pertains to "irregularity" or "bizarreness" in *Shaw*.

Whether or not minority populations are sufficiently "compact" in east-central Georgia to satisfy the threshold requirement in the event of a Section 2 case says little about whether a district line *that the state legislature chooses to draw* might be so irregular as to raise *Shaw* scrutiny. The two inquiries have a fundamentally different purpose. "Compactness" as a threshold requirement under Section 2 pertains to the minimum demographic conditions that must exist before federal statutory law will, in a vote dilution case, override the policy choices of the state legislature and compel judicial relief. The more liberally "compactness" is found in that context, the more constrained will be state legislative choices, and the more expansive will be the application and commands of Section 2.

The opposite holds true in *Shaw* litigation. If the states are to be allowed their traditional prerogatives in reapportionment, "non-compactness" – in the sense of raising a *Shaw* issue because of "bizarreness" – should be very limited. In *Shaw* cases, the more readily a court finds a district to be compact, the broader the state's discretion over reapportionment.

Because compactness in these two distinct contexts – Section 2 and *Shaw* cases – pull in exactly opposite directions, Georgia contends that the two ideas must be carefully distinguished here. Georgia strongly believes that a

holding that minority communities are not sufficiently "compact" to cross the Section 2 threshold is a far different conclusion than to hold that those same communities cannot be joined, *by the choice of the legislature*, without violating the Equal Protection Clause because their joinder is so non-compact as to be "bizarre" and violative of *Shaw*.

Indeed, if Georgia were not correct in this regard and if these two notions of compactness were equated, the State would be virtually stripped of its redistricting discretion. The command of Section 2 would reach right out to the point where the prohibitions of *Shaw* took over. The State's discretion in reapportionment would fall to the commands of federal law, a result that surely should not be permitted under either the Fourteenth Amendment or the Voting Rights Act. Whether African-American communities in the present eleventh district are or are not "compact" for Section 2 purposes says little about whether their being joined in fact in a single district creates a *Shaw* problem.

IV. PLAINTIFFS FAILED TO ESTABLISH THE TRADITIONAL REQUISITES OF STANDING AT THE TRIAL OF THIS CASE.

Much has been said in this case about the issue of standing. It is a principal focus of the Abrams intervenors' brief, and it is the focus of the amicus brief filed on behalf of the States of Texas and North Carolina. While the Georgia defendants have not specifically addressed this issue before, that is largely because it was

adequately addressed by other parties and, being jurisdictional in nature, it was an issue that could not be waived. In light of certain arguments now advanced by appellees on the standing issue, Georgia feels constrained to make the following comments in reply.

First, we would suggest that the issue of standing remains open after the *Shaw* decision. If the traditional requirements of standing that have been established by prior decisions of this Court still govern, then it is clear that plaintiffs failed to *prove* what was necessary at the trial of this case to establish that they had standing. Prior to *Shaw*, plaintiffs were required to produce evidence of specific injury and causation to satisfy Article III standing requirements. *Northeastern Florida General Contractors v. City of Jacksonville*, 124 L.Ed.2d 586 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984). That requirement was particularly important in constitutional cases. *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982); *Tennessee Valley Authority v. Ashwander*, 297 U.S. 288 (1936).

As noted elsewhere in the briefs of the parties and various amici, this Court identified several possible harms in *Shaw* that could be caused by race-based districting. *In this case, as a matter of fact, plaintiffs failed to introduce any evidence of such harm.* As such, they seem to have failed in their proof of essential elements that would have established standing in this case.

Apparently recognizing their failure of proof, appellees now argue that *Shaw* created a whole new area of

standing where specific harm need not be proved. Appellees also cite several cases in support of the contention that such standing is really nothing new, but those cases demonstrate just how far afield the plaintiffs are. For example, plaintiffs rely upon *Loving v. Virginia*, 388 U.S. 1 (1967), and they claim that that case involved no "proof of the [anti-miscegenation] law's effect (or lack thereof) on any particular racial group." *Brief of Appellants* at 28. As a matter of fact, however, appellant Richard Loving had been convicted of a felony in that case and was serving one to five years because he had married a "colored" woman. A more palpable direct effect is difficult to imagine. Plaintiffs also cite jury discrimination cases as supposedly supporting their view that "no harm" need be shown to establish standing, but those cases, of course, involved actual *exclusion* of people from jury service. Harm was again quite apparent there. *See Hernandez v. New York*, 500 U.S. 352 (1991) and *Batson v. Kentucky*, 476 U.S. 79 (1986), cited in *Brief of the Appellees* at 28.[6]

Thus, unless *Shaw* is meant to overturn this Court's standing decisions, plaintiffs' failure of proof to substantiate their allegations of harm and injury are fatal.

---

[6] In a last-ditch effort to establish "harm," appellees state in their brief that one of the plaintiffs is now "separated from his relatives by only a dirt road," *Brief of Appellees* at 28, but where he lives obviously had nothing to do with redistricting. He chose to live where he did, and the dirt road between plaintiff and his relatives exists regardless of how congressional lines were drawn. Nothing plaintiffs cite *as evidence* in this case remotely satisfies the harm and impact requirements that have governed standing cases to date.

CONCLUSION

For the reasons set forth herein and in their principal brief, appellants respectfully request that the judgment of the district court be reversed and that the case be remanded with instructions that the complaint be dismissed.

MICHAEL J. BOWERS
Attorney General of the
State of Georgia
Georgia Bar No. 071650

DENNIS R. DUNN
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
404/656-7298
Georgia State Bar No. 234098

WALBERT & MATHIS
DAVID F. WALBERT
Counsel of Record
Georgia Bar No. 730450

100 Peachtree Street
Suite 1010
Atlanta, Georgia 30303
404/523-5000

Attorneys for Appellants